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No. 274

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Supreme Court of the United States

October Term, 1942

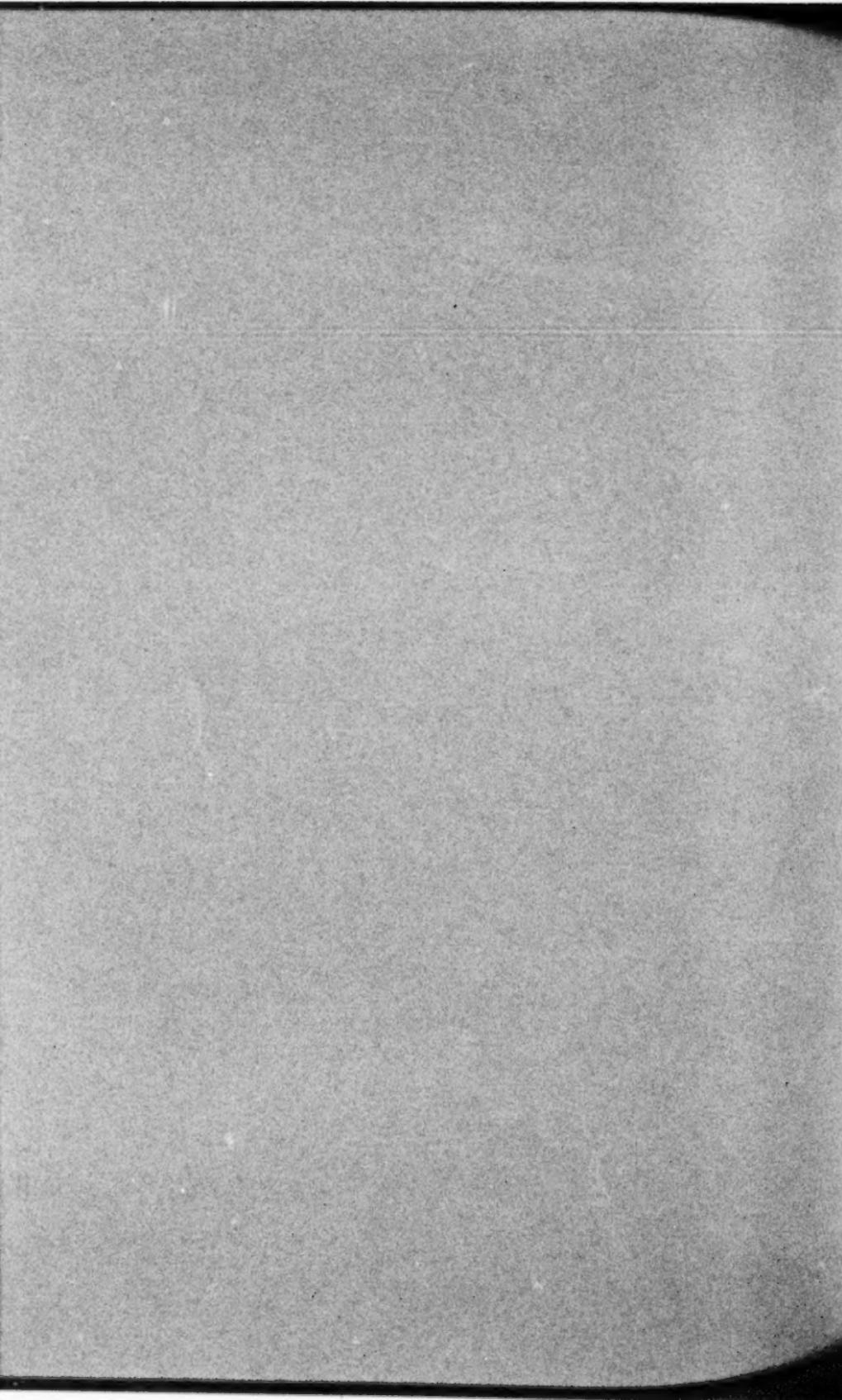
LOGAN W. MARSHALL AND GRACE M. MARSHALL,
Petitioners.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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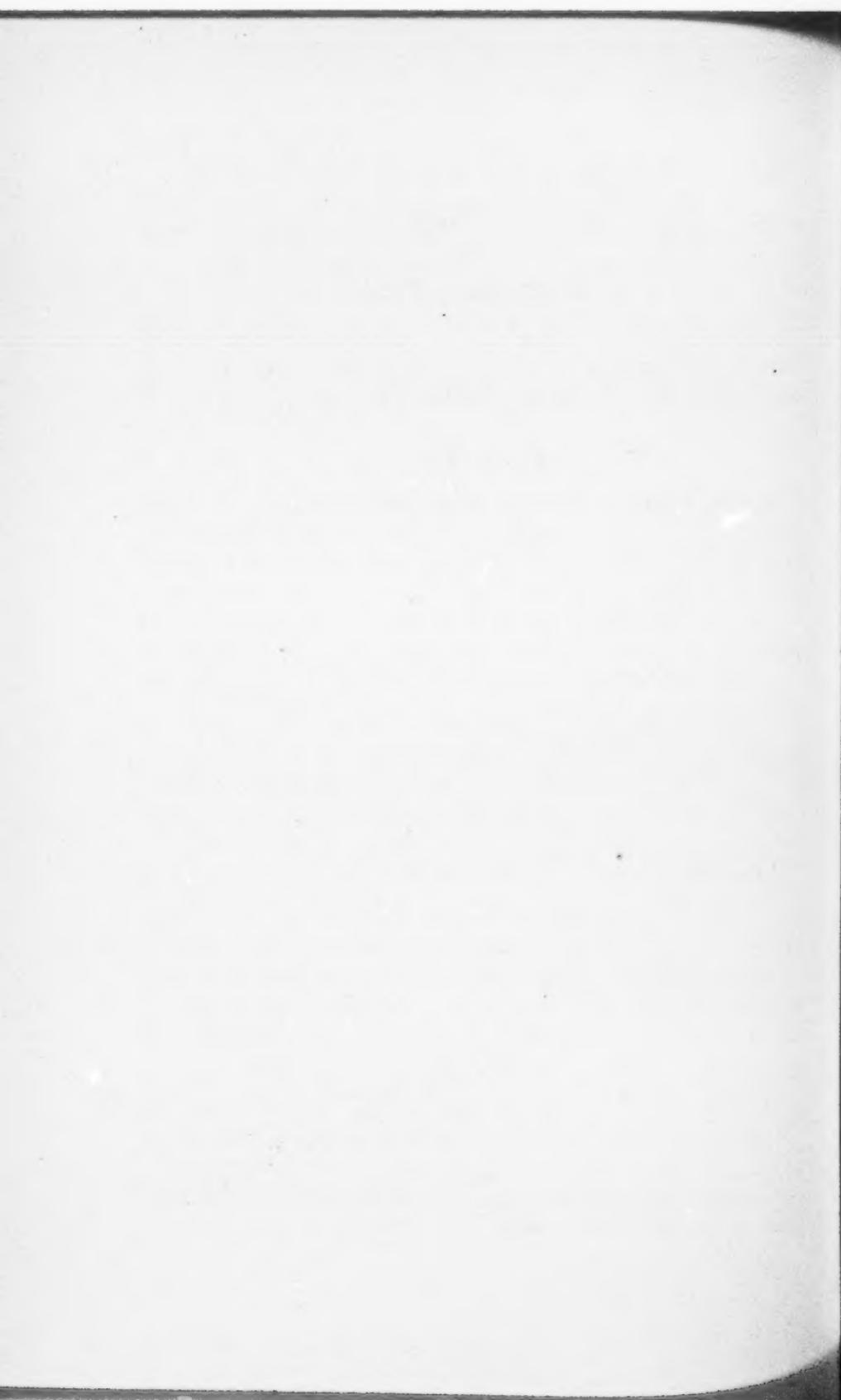
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. _____

LOGAN W. MARSHALL and GRACE M. MARSHALL,
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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUP- PORT THEREOF.

To the Honorable, The Chief Justice and Associate Justices
of the Supreme Court of the United States:

SUMMARY STATEMENT.

Logan W. Marshall and Grace M. Marshall, petitioners herein, own a Montana farm, situate in Lake County, Montana, and an Ohio farm of two hundred and seventy-five acres situate in Shelby County, Ohio. The Montana farm was purchased in March, 1928, and petitioners at once sought to develop it by clearing the ground and planting a sweet-cherry orchard. After seven years of toil and expense, however, petitioners' efforts went for naught due to an unsea-

sonable and extraordinary freeze in October, 1935, which practically destroyed the orchard. The extent of petitioners' loss was not disclosed until the spring of 1936, when two hundred eight-year-old trees were found to be dead. Petitioners strove to save the orchard, but in 1937 most of the remainder of the trees were found to be dead or had sprouted below the graft to thorn-tree roots, thereby becoming thorn trees of no value whatever (R. 15-16).

In their income-tax return for the calendar year 1936, petitioners claimed a deduction representing a loss of \$10,607.99 from the business of farming (R. 57), of which \$7,000 represented the loss of two hundred trees caused by the freeze. They also claimed a loss of \$90 from theft of personal property from the Montana farm. In their income-tax return for the calendar year 1937, they claimed a deduction representing a loss of \$7,390.42 from the business of farming (R. 63), of which \$3,832.50 represented the loss of 75 trees caused by the freeze, and \$90 represented damage done by a flood to a bridge, dam, and fence on the Ohio farm. The remainder of the deductions claimed in 1936 and 1937 consisted of items of expenditure for labor, material, and supplies, interest, taxes, and depreciation incident to the business of developing and operating the Montana and Ohio farms.

With the exception of taxes paid on account of petitioners' farms, respondent disallowed the deductions claimed on the ground that petitioners were not engaged in the business of farming and that the basis for determining the loss of the orchard from the freeze had not been established. Thereupon petitioners filed a petition for redetermination with the United States Board of Tax Appeals and at the hearing sought to show the contents of certain schedules which had been attached to their original return for the year 1936, as it had been filed with respondent, by the use of secondary

evidence after respondent had been unable to produce or account for the original schedules (R. 28-32). They also offered the testimony of petitioner, Logan W. Marshall, as to the value of certain property which they owned and upon which the claim of loss was based (R. 40-41). The Board, however, refused to permit the use of secondary evidence and to allow Logan W. Marshall to testify; and affirmed the determination of respondent on two grounds: (1) the evidence offered by petitioners failed to show an enterprise entered into for profit or a trade or business (R. 17-18) and (2) no competent evidence of the number and value of the trees lost had been adduced (R. 17). Petitioners then sought a review of the decision of the Board by the United States Circuit Court of Appeals for the Sixth Circuit, but that Court, with an exception not now material, affirmed the action of the Board, upon the ground that there was substantial evidence to support the decision of the Board (R. 85).

OPINIONS BELOW.

The United States Board of Tax Appeals filed a memorandum opinion on February 12, 1941, which is unreported (R. 15-18). The United States Circuit Court of Appeals for the Sixth Circuit did not write an opinion but merely entered an order dated May 8, 1942, affirming the action of the Board (R. 85). On May 27, 1942 petitioners filed a petition for rehearing (R. 87) which on June 5, 1942 was denied (R. 91).

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit to be reviewed is contained in the order referred to, which was entered May 8, 1942 (R. 85).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (Title 28, § 347, U. S. C.).

QUESTIONS PRESENTED.

1. Did the United States Circuit Court of Appeals for the Sixth Circuit err in affirming the action of the United States Board of Tax Appeals in excluding secondary evidence offered by petitioners of the contents of certain schedules which had been attached to the original return of petitioners for the year 1936 as it was filed with respondent and which he was unable to produce or account for at the hearing before the Board?
2. Did said Court err in affirming the action of said Board in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which he owned and upon the loss of which he based his claim in this case?
3. Did said Court err in affirming the action of said Board in finding that its conclusions were supported by substantial evidence?

REASONS RELIED UPON FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

1. The affirmance by the United States Circuit Court of Appeals for the Sixth Circuit of the action of the United States Board of Tax Appeals in refusing to permit petitioners to use secondary evidence of the contents of the schedules which had been attached to their income-tax return for the calendar year 1936 and which respondent was unable to produce or account for at the hearing; and of its action in refusing to permit petitioner, Logan W. Marshall, to testify as to the value of certain property which he owned and upon the loss of which petitioners based their claim in this case, constitutes a decision upon a federal question in a way probably in conflict with applicable decisions of this Court. *Cornett v. Williams*, 20 Wallace 226, 246, 22 L. Ed. 254 (1873); *Sicard v. Davis*, 6 Peters 124, 8 L. Ed. 342 (1832).

2. In neglecting or refusing to discharge its duty to decide the questions of law presented by the refusal of the United States Board of Tax Appeals to permit petitioners to use secondary evidence or to allow petitioner, Logan W. Marshall, to testify as to the value of his property, assigned as error in the petition for review (R. 27), the United States Circuit Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has so sanctioned such a departure by the United States Board of Tax Appeals as to call for an exercise of this Court's power of supervision, in order that petitioners may not be denied their day in court. *Cohens v. Virginia*, 6 Wheaton 264, 5 L. Ed. 257 (1821); *Hormel v. Helvering*, 312 U. S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (1941).

3. In holding that there was substantial evidence to support the finding of said Board that petitioners were not engaged in the business of farming during the calendar years 1936 and 1937, the decision of said Court is erroneous as a matter of law and is in direct conflict with the decisions of other circuit courts of appeals on the same matter. *Wilson v. Eisner*, 282 Fed. 38 (CCA, 2d, 1922); *Commissioner of Internal Revenue v. Widener*, 33 F. (2d) 833 (CCA, 3d, 1929); *Commissioner of Internal Revenue v. Field*, 67 F. (2d) 876 (CCA, 2d, 1933); *Whitney v. Commissioner of Internal Revenue*, 73 F. (2d) 589 (CCA, 3d, 1934).

In support of the foregoing grounds of application for a writ of certiorari petitioners submit the accompanying brief.

WHEREFORE, your petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete tran-

script of the record of the proceedings in case No. 9030, entitled on its docket "Logan W. Marshall and Grace M. Marshall v. Commissioner of Internal Revenue," and that the judgment of said Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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